88-14

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

HECTOR L. TOLEDO
Seaman Recruit
United States Navy

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

When an accused service member pending trial by court-martial is evaluated by a military psychologist at the request of defense counsel in preparation for trial, with a request by the defense counsel that the results of the evalution remain confidential, is it constitutionally permissible for the prosecution to call the military psychologist on the issue of guilt or innocence, absent the insanity defense being raised, to rebut the testimony of the service member and to attack the service member's credibility by using statements made, and opinions formed, during the course of the evaluation?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Hector L. Toledo, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals rendered in this proceeding on December 14, 1987, and adhered to in an additional opinion on May 9, 1988 on a petition for reconsideration.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals is reported at 25 M.J. 270 (C.M.A. 1987), and its opinion on petition for reconsideration is reported at 26 M.J. 104 (C.M.A. 1988). They are reprinted as Appendices A and B, respectively.

The opinion of the United States Navy-Marine Corps Court of Military Review, rendered March 26, 1986, has not been reported. It is reprinted as Appendix C.

JURISDICTION

The United States Court of Military Appeals granted the petition for review in this case on July 7, 1986. The decision of that court was rendered on December 14, 1987, affirming petitioner's conviction of March 15, 1985, as previously modified and affirmed by the United States Navy-Marine Corps Court of Military Review on March 26, 1986. The United States Court of Military Appeals, in an additional opinion on May 9, 1988, adhered to its original decision on a petition for reconsideration. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

STATUTES INVOLVED

10 U.S.C. § 831(b), Article 31(b), Uniform Code of Military Justice. Compulsory self-incrimination prohibited

No person subject to this chapter may interrogate, or request any statement from any accused or a person suspected of any offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement

made by him may be used as evidence against him in a trial by court-martial.

10 U.S.C. § 838(b)(1), Article 38(b)(1), Uniform Code of Military Justice. Duties of trial counsel and defense counsel

The accused has the right to be represented in his defense before a general or special court-martial or at an investigation under section 832 of this title (article 32) as provided in this subsection.

REGULATIONS INVOLVED

Rule 706(a), Rules for Court-Martial, Manual for Courts-Martial, United States, 1984. Inquiry into the mental capacity or mental responsibility of the accused

(a) Initial action. If it appears to any commander who considers the disposition of charges, or to any investigating officer, trial counsel, defense counsel, military judge, or member that there is a reason to believe that the accused lacked mental responsibility for any offense charged or lacks capacity to stand trial, that fact and the basis of the belief or observation shall be transmitted through appropriate channels to the officer authorized to order an inquiry into the mental condition of the accused. The submission may be accompanied by an application for a mental examination under this rule.

Rule 302(a), Military Rules of Evidence, Manual for Courts-Martial, United States, 1984. Privilege concerning mental examination of an accused

(a) General rule. The accused has the privilege to prevent any statement made by the accused at a mental examination ordered under R.C.M. 706 and any derivative use of such a statement from being received into evidence

against the accused on the issue of guilt or innocence or during sentencing proceedings . . .

Rule 501(d), Military Rules of Evidence, Manual for Courts-Martial, United States, 1984. General rule

(d) Notwithstanding any other provision of these rules, information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity.

Rules 502(a), (b)(3), Military Rules of Evidence, Manual for Courts-Martial, United States, 1984. Lawyer-client privilege

(a) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between the client or the client's representative and the lawyer or the lawyer's representative, . . .

(b) Definitions. As used in this rule:

* * * * *

(3) A "representative" of a lawyer is a person employed by or assigned to assist a lawyer in providing professional legal services.

STATEMENT OF THE CASE

Petitioner was tried by a general court-martial convened by Commander, U.S. Naval Forces, Japan, and held at Fleet Activities, Yokosuka, Japan in March, 1985, for violations of the Uniform Code of Military Justice alleging rape, sodomy, and indecent acts on a female under the age of 16. Contrary to his pleas, he was found guilty of one specification of rape, five specifications of the lesser offense of indecent assault, and one specification of inde-

cent acts. Petitioner was sentenced to 30 years confinement, total forfeiture of all pay and allowances, and a dishonorable discharge from the Naval Service. Subsequent actions by the convening authority and the U.S. Navy-Marine Corps Court of Military Review reduced the confinement to 15 years, and reduced the rape specification to the lesser offense of committing indecent acts upon a child under the age of 16.

Prior to trial, petitioner's detailed military defense counsel contacted Captain Paul E. Rosete, a U.S. Air Force clinical psychologist, and "requested that he examine this individual to determine whether or not there were any possible problems concerning sanity and specifically, [he] requested that the conclusions, reports, notes and tests be kept in strict confidence and that they be released to none other than [himself] or the accused." Record at 295. Doctor Rosete agreed to examine petitioner. Petitioner's counsel notified the lawyer for the naval command in Misawa of his intention to have petitioner examined by Doctor Rosete, and the government provided petitioner's transportation to the examination from the facility in which he was being held in pretrial confinement. Doctor Rosete's evaluation of petitioner encompassed 10 to 12 hours of interviews. Doctor Rosete confirmed later at trial that petitioner's counsel had requested a confidential evaluation.

The charges specified acts allegedly committed by petitioner with the five year old daughter of a fellow service member, Petty Officer Arnardo Serrano, who had befriended petitioner at the air base at Misawa, Japan shortly after petitioner's arrival for duty there in December, 1983. The charges specified that petitioner sexually assaulted the girl on two occasions on the evening of November 6, 1984, and on one occasion on an unspecified

date prior to that evening. At trial, the prosecution, in its case in chief, called Petty Officer Serrano. He claimed to have discovered petitioner in the course of committing a sexual act with his daughter in her bedroom on the evening of November 6. The prosecution also presented, with the agreement of the defense, a videotape of a deposition taken of the victim by the prosecution and the defense during the course of the pretrial investigation into the case. Other witnesses called by the prosecution included the seven year old brother of the girl, the emergency room doctor who had examined the girl on the evening of November 6, an agent of the Naval Investigative Service who collected hairs from the girl's bedroom, a forensic serologist, the arresting military policeman, a social worker, the girl's mother, and a family friend.

The defense's case consisted solely of petitioner testifying on his own behalf. He explained that on the evening of November 6 he went to visit his friend, Petty Officer Serrano, at his home as he had often done in the past. He was very fond of the children, and he become good friends with the children and their parents. On that evening, he asked Serrano if he could give the three children their baths. The father agreed, and petititioner proceeded upstairs with the three children. He gave them baths, and then proceeded to read them each a story in turn as he put them to bed. He testified that he was not sexually molesting the girl when Serrano walked into the room. He testified that he was examining the girl's vaginal area because she had been complaining during the course of the evening that the area was itchy. He explained that when Serrano walked into the room he quickly, and unexpectedly, became enraged and threw him out of the house.

Petitioner went on to explain that he went from the Serrano home to a local bar where he met a Japanese woman

that he knew, and that he subsequently had sex with her. He explained that the semen stain discovered in his underwear after his arrest that evening was the result of intercourse that evening with the Japanese woman, from whom he withdrew before ejaculation.

The prosecution then called Doctor Rosete in rebuttal of petitioner's testimony. The defense objected on several grounds, one of which was that the information obtained by Doctor Rosete during his examination of petitioner was privileged. The military judge ruled that the doctor could testify concerning the sexual history that petitioner had related to him, especially as it related to his sexual encounter with the Japanese woman on the night in question. The military judge also ruled that Doctor Rosete could give an opinion as to petitioner's truthfulness based upon the interviews he conducted. Doctor Rosete testified that although he had obtained a detailed sexual history from the petitioner following the events of that evening, petitioner had never related his encounter with the Japanese woman. Additionally, and of more significance, the Doctor opined that petitioner was being "less than candid" with him during the course of the interviews.

The U.S. Navy-Marine Corps Court of Military Review found that the information related to Doctor Rosete by petitioner was not privileged because defense counsel had not made a request for a mental examination under Rule 706 of the Rules for Courts-Martial. Additionally, it found that, under the circumstances, the doctor had no duty to warn petitioner of his right to remain silent under Article 31 of the Uniform Code of Military Justice. See Appendix C, p. 23a *infra.*

The U.S. Court of Military Appeals granted the petition for review on three issues, one of which was whether the military judge had erred by admitting the testimony of

Doctor Rosete in violation of petitioner's rights under Article 31(b) of the Uniform Code of Military Justice. The court, in its opinion of December 14, 1987, decided that the privilege against disclosing statements made by an accused during a mental examination, recognized by Rule 302 of the Military Rules of Evidence, did not apply because defense counsel never made a request for a mental examination under Rule 706 of the Rules for Courts-Martial. See Appendix A, p. 11a *infra*. The court concluded that the attorney-client privilege would have been applicable had the defense either procured the services of the expert at its own expense, or had made a request for such services through "the proper appointing authorities." See Appendix A, p. 13a *infra*. The court found, however, that the defense had no right to help itself to government experts. Therefore, the court held that the attorney-client privilege did not apply under the circumstances of this case. The court also held that there was no requirement for Doctor Rosete to advise petitioner of his right to remain silent under Article 31(b), Uniform Code of Military Justice, because he was evaluating petitioner at the request of the defense and, therefore, was not interrogating or requesting a statement within the meaning of that article. See Appendix A, p. 16a *infra*.

In its opinion on the petition for reconsideration of May 9, 1988, the court reiterated its finding that although the attorney-client relationship can be broad enough to cover the assistance of experts such as psychologists, the defense failure to "formally" request the services of an expert at government expense undermined its attempt to bring the expert within the protection of the privilege. See Appendix B, p. 18a *infra*.

REASON FOR GRANTING THE WRIT

The U.S. Court of Military Appeals' decision raises important and unresolved issues concerning the Sixth

Amendment right to effective assistance of counsel as it applies to experts used by the defense in preparation for trial.

This case presents this Court with the opportunity to define the constitutional dimensions of the Sixth Amendment right to effective assistance of counsel, and the attendant attorney-client privilege, as they relate to Government mental health experts used by the defense in preparation for trial. This definition requires an analysis of a defendant's right to have a fully prepared and competent defense as envisioned by the Sixth Amendment to the U.S. Constitution.

This question is of special importance because it addresses the heart of a defendant's right to put on a competent defense without fear that the Government will attempt to undermine that right by compelling, on the issue of guilt or innocence, the testimony of the expert consulted. This question is also important because an adequate mental evaluation by a qualified mental health expert is often "crucial to the defendant's ability to marshal his defense." *Ake v. Oklahoma*, 470 U.S. 68, 80 (1985). The evaluation will only be reliable and useful to the defense if it is a comprehensive examination in which a defendant is able to be candid and completely open. However, if a defendant, after being candid and open with his expert, finds his disclosures used by the prosecution to assist in proving its case on the merits, then he has been deceived into becoming the instrument of his own conviction.

This Court has already recognized the constitutional dimensions of an indigent defendant's need to have the assistance of psychiatric expertise provided by the Government in the preparation of his case where sanity is likely to be a significant factor in the defense. *Ake*, 470 U.S. at 83.

"[W]hen a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense." *Id.* at 76. In its decision, the Court of Military Appeals recognized that the requirement for access to psychiatric expertise set forth by *Ake* was applicable to a military accused, independent of the right to request an inquiry into mental responsibility under Rule 706 of the Rules for Courts-Martial. The court, citing Article 46, Uniform Code of Military Justice, 10 U.S.C. § 846,[1] concluded that indigence is not a prerequisite to expert assistance in the military. See Appendix A, pp. 13a-14a *infra*. The court stated:

> Had the defense requested that the Government provide it with a medical officer for assistance in the preparation of its case, and had the Government failed to do so, we would have concluded, under *Ake*, that appellant had been deprived of 'meaningful access to justice,' given the circumstances in which appellant was discovered by Petty Officer Serrano.

Id. The court also concluded that "[h]ad the defense procured medical assistance . . . at its own expense, we would have held that communications between appellant and that expert were within the attorney-client relationship."

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[1] Article 46 provides:

Opportunity to obtain witnesses and other evidence

The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States, or the Territories, Commonwealths, and possessions.

See Appendix A, p. 13a *infra.* However, because the defense consulted with a Government expert without going "through proper channels," the court found that the defense's "tactics" were insufficient to achieve attorney-client status. See Appendix B, p. 18a *infra.*

The court came to this inexplicable conclusion despite the fact that: 1. the defense notified the Government before the evaluation of its intention to have Doctor Rosete evaluate petitioner; 2. the Government transported petitioner from the confinement facility to the interviews; 3. Doctor Rosete freely and readily lent his services to the defense knowing that the assistance was requested in anticipation for trial, and thereafter conducted 10 to 12 hours of interviews with petitioner; 4. the defense counsel specifically requested Doctor Rosete to keep all statements made during the interviews confidential; and, 5. the defense found itself having to prepare for trial at an air base in Japan where access to expert assistance was severely limited. The court's decision is also inexplicable considering that the defense never called Doctor Rosete as a witness, and never raised the insanity defense. Therefore, the Government was never placed in the position of having to rebut expert testimony put on by the defense on the sanity issue. Instead, the Government called Doctor Rosete to rebut petitioner's version of the facts, and to attack his credibility on the issue of guilt or innocence.

In *United States v. Alvarez,* 519 F.2d 1036 (3rd Cir. 1975), the Third Circuit Court of Appeals examined the parameters of the attorney-client relationship on a federal appeal as it related to mental health experts consulted by the defense in anticipation for trial. The court addressed the issue of whether a mental health expert retained by the

defense with the permission of the court[2] could be compelled to testify by the Government on the sanity issue after it had been raised by the defense. *Id.* at 1045. Although it found that the disclosures made to the expert were totally voluntary, and therefore did not raise the privilege against self-incrimination, it did find the Sixth Amendment right to effective assistance of counsel and the attorney-client privilege to have been violated by the prosecution's compelling the testimony of the expert. The court found that disclosures made to the defense's expert should be unavailable unless the expert is put on the witness stand by the defense, thereby waiving the privilege. *Id.* at 1047. The court addressed the interference with the right to effective assistance of counsel by stating: "The attorney should not be inhibited from consulting one or more experts, with possibly conflicting views, by fear that in doing so he may be assisting the government in meeting its burden of proof . . ." *Id.*

The decision of the U.S. Court of Military Appeals in this case creates just such a fear on the part of defense counsel at courts-martial. Although the court recognized the applicability of *Ake* to the military justice system, and although it also acknowledged the applicability of the attorney-client relationship to mental health experts procured by the defense at its own expense, it refused to acknowledge that petitioner had entered into the interviews with Doctor Rosete with the very reasonable expectation that everything he revealed would be kept confidential.

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[2] The trial defense counsel in *Alvarez* applied to the district court to retain the psychiatric expert pursuant to 18 U.S.C. § 3006A(e). 519 F.2d at 1045. However, there is nothing in the court's decision to lead one to the conclusion that its application of the Sixth Amendment to the retained expert was premised upon this procedural step.

The court based its decision on the defense's failure to obtain the desired assistance through appropriate channels. However, it never detailed what those channels are.[3] The defense counsel took reasonable steps in this case to ensure that he was obtaining the services of Doctor Rosete in furtherance of providing a prepared and competent defense for his client. If it was the intention of the Government to withhold such assistance absent a court order, the military medical community, by regulation, could have restricted access to mental health services for individuals pending court-martial. However, the fact is that Doctor Rosete voluntarily provided services to the defense fully aware that those services were being provided for the preparation of the defense's case. The court cannot now vitiate petitioner's constitutional right to effective

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[3] There are no procedures under the Rules for Courts-Martial which specifically provide for exclusive defense utilization of military experts. Rule 703(d) of the Rules for Courts-Martial does provide a procedure for requesting employment of an expert:

> **Employment of expert witnesses.** When the employment at Government expense of an expert is considered necessary by a party, the party shall, in advance of employment of the expert, and with notice to the opposing party, submit a request to the convening authority to authorize the employment and to fix the compensation for the expert. The request shall include a complete statement of reasons why employment of the expert is necessary and the estimated cost of employment. A request denied by the convening authority may be renewed before the military judge who shall determine whether the testimony of the expert is relevant and necessary, and, if so, whether the Government has provided or will provide an adequate substitute. If the military judge grants a motion for employment of an expert or finds that the Government is required to provide a substitute, the proceedings shall be abated if the Government fails to comply with the ruling. In the absence of advance authorization, an expert witness may not be paid fees other than those to which entitled under subsection (e)(2)(D) of this rule.

assistance of counsel by relying on a failure to comply with some undefined procedures.

The decision of the U.S. Court of Military Appeals is erroneous because it predicates petitioner's right to effective assistance of counsel upon an undefined bureaucratic requirement to go through proper channels. This result is so detrimental to a military attorney's effective representation of his client as to be prohibited by the Sixth Amendment. Therefore, consideration by this Court of this matter is essential.

CONCLUSION

The petitioner respectfully submits that his petition for a writ of certiorari should be granted in order that this Court may address the important issue of Constitutional law presented.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES,

Appellee,

v.

HECTOR L. TOLEDO,
SEAMAN RECRUIT, U.S. NAVY,

Appellant.

No. 54,817.
NMCM 85 3868.

U.S. Court of Military Appeals.

Dec. 14, 1987.

For Appellant: *Lieutenant Colonel Richard E. Ouellette, USMC* (argued).

For Appellee: *Major F. F. Krider, USMC* (argued); *Commander Michael P. Green, JAGC, USN* (on brief); *Captain Carl H. Horst, JAGC, USN* and *Captain Wendell A. Kjos, JAGC, USN.*

Opinion of the Court

COX, Judge:

A general court-martial composed of officer and enlisted members convicted appellant, contrary to his pleas, of one specification of rape, five specifications of indecent assault, and one specification of committing indecent acts on a female under the age of 16, in violation of Articles 120 and 134, Uniform Code of Military Justice,

10 U.S.C. §§ 920 and 934, respectively. He was sentenced to a dishonorable discharge, confinement for 30 years, and total forfeitures. The convening authority suspended confinement in excess of 20 years and otherwise approved the sentence. The Court of Military Review was unpersuaded beyond a reasonable doubt that penetration had occurred and reduced the rape specification to committing indecent acts upon a child under the age of 16, a violation of Article 134. Upon reassessment of the sentence, the court reduced the period of confinement to 15 years but otherwise affirmed the sentence as adjudged.

We granted review of the following issues:

I

WHETHER THE MILITARY JUDGE ERRED BY AUTHORIZING THE PROSECUTION TO PRESENT AN EXPERT WITNESS TO OFFER HIS OPINION ON APPELLANT'S TRUTH AND VERACITY.

II

WHETHER THE MILITARY JUDGE ERRED BY AUTHORIZING THE TESTIMONY OF AN EXPERT WITNESS CONCERNING A CHILD-ABUSE VICTIM'S CREDIBILITY.

III

WHETHER THE MILITARY JUDGE ERRED BY ADMITTING TESTIMONY OF A CLINICAL PSYCHOLOGIST IN VIOLATION OF ARTICLE 31(b)[, UCMJ, 10 U.S.C. § 831(b)].

Finding no error to the substantial prejudice of appellant, we affirm. Art. 59(a), UCMJ, 10 U.S.C. § 859(a).

Of the granted issues, only a portion of the first issue requires substantial discussion. In order to resolve it and the other issues, however, a detailed description of the evidence is necessary.

When appellant first arrived for duty in Misawa, Japan, he was befriended by Petty Officer Arnardo Serrano. As Serrano testified: "He [appellant] was new in the command. He didn't know anybody. And he was—he felt lost, so I was just trying to make him feel at home." Appellant accepted the invitation and became a frequent visitor to the Serrano home, where he often played with the three young Serrano children. One of the reasons the Serranos let appellant play with their children so much was that appellant often told them how much he missed his adopted younger sister who was back home.

On the evening of November 6, 1984, appellant was at the Serrano home with Petty Officer Serrano and the children. Mrs. Serrano had gone to a baby shower. Serrano was involved in connecting some video equipment when it was time for the children to bathe and get ready for bed. Appellant insisted on going with them and, even though Serrano "was a little uncomfortable" about it, he let him. Periodically, Serrano would check in to make sure everything was all right.

After the bath, appellant commenced reading bedtime stories to the children in their rooms. Following one unusually long period of silence, Serrano again went upstairs to see what was happening. Peering into his 5-year-old daugher's room, he discovered a sickening scene. The child was sitting at the edge of her bed, leaning backward, with her panties pulled down. Appellant stood directly in front of her "with his pants open." At trial, Serrano testified:

> Toledo . . . turned away, and . . . walked towards the corner. He had his hands in front of him. I did not see his penis, but I saw a pubic hair, I saw his public hair. . . . [Toledo] quickly turned away and started to zip his pants. I said, "What the hell is going on here?". I yelled. And my daughter answered, "Toledo was only scratching." . . . She stood there . . . [with] a terrified look on her face, and she was shaking.

Serrano further testified as follows:

> Q. Will you describe for the members what was he doing in the corner, could you observe him from the corner?
>
> A. He was fixing his pants, trying to fix his pants, put on his belt. I—I stood there after I—I asked what was going on, and my daughter said he was only scratching himself, I just stood there for a few seconds, and I couldn't believe what was going on. He was—he just had turned, and he was over there fixing his pants, he was just buckling them up, zipping them up and everything.

In response to Serrano's yell:

> He [appellant] didn't say anything. He just turned away with his head down, that's when he started fixing his pants. Then I just—I yelled—I yelled out again, I said, "Get the hell out of my house. I never want to see you near my kids. I never want to see your face again." And Toledo walked out of the door, he was still fixing his pants.
>
> Q. Did he—did he say anything to you?
>
> A. He never said a word. He never even looked at me. There was never any eye contact.
>
> Q. Could you describe his appearance at the time he left the room?

A. He was—he was sweating profusely. He was soaked, he was drenched in sweat. And he just slowly walked out of the—out of the room.

Q. To the best of your memory, what—what was the temperature, what were the climatic conditions—

A. Oh, it was cold that night, it was really cold that night. It was in November. It was pretty cold.

As appellant was leaving, Serrano instructed him to report to his barracks, and he informed him that he would be calling the Shore Patrol. Rather than walking in the direction of the barracks, appellant headed straight for the main gate. Several hours later, he was apprehended off base. His clothing was seized; laboratory analysis revealed the presence of a large semen stain on his underpants.

Approximately 3 months later, the victim testified at an Article 32, UCMJ, 10 U.S.C. § 832, session. Her testimony was videotaped, and a verbatim transcript was prepared. At trial, the defense agreed that the victim was unavailable to testify and that there had been an adequate opportunity to cross-examine her at the Article 32 hearing. Further, the defense did not wish to have her testify in person. Accordingly, the videotape recording of the victim's prior testimony was played for the court members pursuant to the former-testimony exception to the hearsay rule, Mil.R.Evid. 804(b)(1), Manual for Courts-Martial, United States, 1984.

In her testimony, the girl described the events of the evening, including her mother's departure for the baby shower, the bath in which appellant participated, and the bedtime stories. She also stated that on two occasions that evening appellant put his "pee pee" "[o]n . . . [her] pee pee and poo poo." One of these incidents occurred "[t]he first

time he had came upstairs"; the other occurred when he read the story.

The girl also stated that, on a previous occasion, appellant had taken the three children to his "house" (the barracks), and he had done the same thing to her there in the bathroom with the door locked. On that occasion it also hurt when he "[p]ut his pee pee in . . . [her] pee pee." When she complained of the pain to appellant, "[h]e started doing it some more." According to her testimony, appellant had also touched her "pee pee" with his hands many other times while at her house and had hurt her.[1]

The victim's brother, Ryan, age 7, testified at the trial and corroborated her account of being taken to appellant's barracks. He also confirmed that he and his younger brother stayed in appellant's room watching cartoons on television. His sister, however, had to go to the bathroom. Appellant took her—alone—and they stayed for a "[l]ong time." Petty Officer Serrano testified that he had never given appellant permission to take his children away from their house.

Appellant testified in his defense and admitted taking the children to his barracks without the knowledge or consent of either Petty Officer or Mrs. Serrano. His explanation was: "The Mama-san did say that it was okay by her." He also acknowledged taking the victim to the bathroom on that occasion but denied that he had "ever raped or

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[1] For sentencing purposes, the military judge treated the specifications as only three offenses, grouping them around the events alleged to have occurred between December 25, 1983, and November 5, 1984 (at appellant's barracks); those that occurred at about 9:00 p.m., November 6, 1984 (the first incident at the house); and those that occurred at about 9:50 p.m. (the incident that Petty Officer Serrano walked in on).

sodomized or in any way sexually assaulted or abused" her.

Appellant's version, on direct examination, of the alleged incident at the house was that he "had noticed that . . . [the child] had been scratching herself right through the night." After the bath,

> she was complaining her—her sides were itching. So, I told her, you know, "let me see before I tell your dad," which at the time—that's when her dad came in the house. He came upstairs.

On cross-examination, appellant agreed that, when Serrano walked in, the girl was sitting on the bed, "her gown was up to her chest, . . . [a]nd her pants were down around her knees." He also admitted:

> I touched her in the area where she was complaining about, which was her vagina, and that was about 2 seconds, just to see if she was really hurting. She told me yes. When I turned around to get her father, he was already coming in.

He denied ever having his pants down or open, turning away to buckle or fasten his pants, or masturbating. He claimed that it was the victim who stated, at the time her father burst in, that she was scratching herself. His explanation for the semen in his underwear was that, after he left the Serrano household, he went into town and had sexual intercourse with a woman he knew who worked at a club. On cross-examination, he amplified his explanation thusly:

> Q. Do you want to explain how your underwear had a large stain as a result of ejaculation?
>
> A. I thought I covered that clearly. I was out with a couple of girls that night, I did not shower after we had sex, and that was it.

Q. Are you in the habit of ejaculating in your underwear when you have intercourse with women?

A. Well, that night, I didn't see any reason, you know. Just once in a while, we just go and do it that way.

Q. Do you always have intercourse with women with your underwear on?

A. Once in a while, yes.

Q. Do you want to explain how it's possible to ejaculate into your underwear and have sexual intercourse at the same time?

A. That's very simple. All you got to do is have sex with a girl, pull out whenever you feel like it.

In response to a question by the military judge about whether appellant had "ejaculated with" his "undershorts on," appellant replied:

> No, sir. I did not say that. I simply stated that you just pull out before you ejaculate. It was getting late that night and I just wanted to go home. I just wanted to go see what was going on on base, turn myself in.

Previously, appellant had explained that he knew the Shore Patrol was looking for him because Serrano said he would call them. On recross-examination, he identified his alleged sex partner as a female named "Hiromi" and state that he had known her since he had been in Misawa. He did not produce her, otherwise identify her, or request her as a witness at the court-martial.

With particular regard to the granted issues, the prosecution, during its case-in-rebuttal, apparently stunned the defense by calling as a witness Dr. (Captain) Paul E. Rosete, USAF, a clinical psychologist. The defense objected to Dr. Rosete's testimony on the grounds of privilege. Defense counsel explained that he previously ap-

proached Dr. Rosete in confidence and requested that the doctor examine appellant with a view to determining "whether or not there were any possible problems concerning sanity." Counsel never requested that Dr. Rosete be appointed to examine appellant or to assist in the defense. Privately, however, he asked of Dr. Rosete "that the conclusions, reports, notes, and tests be kept in strict confidence and that they be released to none other than myself or the accused." Counsel's rationale was that this preliminary sort of "check into the mental competency of the accused" was a necessary or desirable predicate to requesting a formal sanity board. On this basis, counsel contended that the Government should be precluded from calling the doctor as a witness, citing Mil.R.Evid. 706.[2]

In response, trial counsel assured the judge that he did not intend to elicit from the doctor any opinion regarding appellant's sanity or lack thereof; his purpose in calling the witness was merely to present his opinion of appellant's "character for truth and veracity," inasmuch as appellant had put such in issue by testifying, and to provide rebuttal

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[2] Mil.R.Evid. 706, Court appointed experts, provides:

(a) *Appointment and compensation.* The trial counsel, the defense counsel, and the court-martial have equal opportunity to obtain expert witnesses under Article 46 [,UCMJ, 10 U.S.C. § 846]. The employment and compensation of expert witnesses is governed by R.C.M. 703.

(b) *Disclosure of employment.* In the exercise of discretion, the military judge may authorize disclosure to the members of the fact that the military judge called an expert witness.

(c) *Accused's experts of own selection.* Nothing in this rule limits the accused in calling expert witnesses of the accused's own selection and at the accused's own expense.

Both Article 46 and R.C.M. 703 deal exclusively with the production of witnesses and evidence at trial; no privileges are supplied by these provisions.

for certain of the assertions made by appellant in his testimony. Counsel cited *United States v. Parker*, 15 M.J. 146 (C.M.A.1983), and *United States v. Matthews*, 13 M.J. 501 (A.C.M.R.1982), *rev'd in part on other grounds*, 16 M.J. 354 (C.M.A.1983), as authority, and the military judge permitted the testimony for these purposes only.[3]

Dr. Rosete then confirmed that defense counsel requested the confidential evaluation and that he interviewed appellant for approximately 10-12 hours.[4] In addition to discussing the alleged offenses with appellant, which appellant steadfastly denied, the doctor probed appellant's sexual history extensively. At no time during the course of these conversations did appellant ever mention having engaged in sexual intercourse with a woman named Hiromi or anyone else on the evening of November 6, 1984.

Literally, it does not seem to matter whether appellant had sex with Hiromi or how the semen stain came to be on his underpants, considering the circumstances under which he was discovered, his admissions about his conduct with the victim, his admission of having previously removed the children from the home without the parent's knowledge or consent, the testimony of the children, and appellant's version of the events which, as the Court of

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[3] The military judge's exact ruling was:

> I will permit the testimony of the witness only as to two particular areas. That would have to do with the sexual history as explained to him by Seaman Recruit Toledo and he may also offer his opinion as to the truth or veracity of Seaman Recruit Toledo, if in fact a sufficient foundation can be laid for him to offer such an opinion.

[4] In view of the absence of testimonial privilege, *see* text *infra*, Dr. Rosete had no choice but to appear as a witness as directed and to respond to the questions of counsel and the military judge.

Military Review aptly put it, "strained credulity." Unpub. op. at 3. However, giving appellant the maximum benefit of the doubt, if any shred of reasonable doubt was left after his testimony, it was obliterated by Dr. Rosete's devastating rebuttal testimony. Therefore, out of an abundance of caution, we consider the propriety of Dr. Rosete's rebuttal testimony.

The Military Rules of Evidence recognize no doctor-patient privilege *per se*. Mil.R. Evid. 501(d) provides:

> Notwithstanding any other provision of these rules, information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity.

See also Analysis of the Military Rules of Evidence, Manual, *supra* at A22-31.

Mil.R.Evid. 706, cited by the defense at trial, is not itself of assistance to appellant. *See* n.2, *supra*. On the other hand, Mil.R. Evid. 302, "Privilege concerning mental examination of an accused," does limit, with certain exceptions, disclosure of statements by an accused during certain mental examinations. In pertinent part, the general rule states:

> The accused has a privilege to prevent any statement made by the accused at a mental examination *ordered under R.C.M. 706* and any derivative evidence obtained through use of such a statement from being received into evidence against the accused on the issue of guilt or innocence or during sentencing proceedings.

(Emphasis added.) The problem for appellant, of course, is that Dr. Rosete was not ordered to examine him under R.C.M. 706 or any other provision. Quite the contrary,

the defense was apparently seeking to avoid tipping its hand at this juncture of trial preparation.[5] Thus, Mil.R. Evid. 302 provides no haven for appellant.

Ironically, there is a rule of evidence that might have permitted appellant to utilize the services of Dr. Rosete without risking disclosure of his statements—the lawyer-client privilege, Mil.R.Evid. 502(a). That rule provides, *inter alia,*

> a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between the client . . . and the lawyer or *the lawyer's representative.*

The " 'representative' of a lawyer" is defined as "a person *employed by or assigned to* assist a lawyer in providing professional legal services." Mil.R.Evid. 502(b)(3) (emphasis added). The drafters of the rule identified, nonexclusively, paraprofessionals and secretaries as possible representatives of lawyers. Analysis, Manual, *supra* at A22-31.

There is federal authority, however, that psychiatrists—and arguably psychotherapists in general—employed by or appointed for the defense to assist in the preparation of an insanity defense, fall within the attorney-client privilege, at least where such privilege is not waived by tendering an insanity defense. *United States v. Alvarez,* 519 F.2d 1036 (3d Cir.1975); *United States ex*

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[5] The Government's theory is that the defense wanted to avoid a sanity board unless they could be assured in advance of favorable results. Thus the Government would not have access to expert opinion that appellant was perfectly sane, thereby undermining the defense's sentencing theme that appellant was just "a sick man."

rel. Edney v. Smith, 425 F.Supp. 1038 (E.D.N.Y.1976), *aff'd,* 556 F.2d 556 (2d Cir.1977). The psychiatrist's (psychotherapist's) place on the defense team to "conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense" of insanity is now established beyond cavil. *Ake v. Oklahoma,* 470 U.S. 68, 83, 105 S.Ct. 1087, 1097, 84 L.Ed.2d 53 (1985).

Had the defense requested that the Government provide it a medical officer for assistance in the preparation of its case, and had the Government failed to do so, we would have concluded, under *Ake,* that appellant had been deprived of "[m]eaningful access to justice," given the circumstances in which appellant was discovered by Petty Officer Serrano. *Id.* at 77, 105 S.Ct. at 1094. However, requesting this assistance would have resulted in that very tipping off of the Government that the defense apparently did not desire.

Had the defense procured medical assistance for the preparation of its defense at its own expense, we would have held that communications between appellant and that expert were within the attorney-client relationship, at least unless a mental-responsibility defense were presented. *E.g., United States v. Alvarez, supra.* However, here the defense tried to commandeer a government official. As the Supreme Court observed in *Ake:*

> This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Our concern is that the indigent defendant have access to a competent psychiatrist for the purpose we have discussed.

470 U.S. at 83, 105 S.Ct. at 1097.

By the same token, a servicemember has no right simply to help himself to government experts and bring them into the attorney-client relationship, bypassing the proper appointing authorities. Indigency, of course, is not a prerequisite to expert assistance in the military. Art. 46, UCMJ, 10 U.S.C. § 846. To be sure, appellant has not claimed, either at trial or on appeal, that an attorney-client privilege existed with respect to Dr. Rosete, and under the circumstances we also find none. *Cf. United States v. White,* 617 F.2d 1131 (5th Cir.1980). Accordingly, this aspect of the issue is without merit.

The remaining issues may be resolved more succinctly. First, trial counsel elicited from Dr. Rosete the fact that he had administered a battery of psychological tests to appellant and that he believed he had "had sufficient contact with" appellant "to form a personal opinion regarding his character for truthfulness." Asked what that opinion was, the doctor replied—nonresponsively:

> I think that given the time that I spent with him and the information that he provided, and the manner in which it was provided, that *he was being less than candid.*

(Emphasis added.) Presumably the lack of candor related to appellant's denial of improper conduct. The defense did not object at trial to either the question or the answer, but now argues that appellant was prejudiced by the doctor's conclusion.

Admittedly, it is not clear whether the question called for Dr. Rosete's expert opinion based on the testing and other professional techniques, Mil.R.Evid. 702-705, or his lay opinion, Mil.R.Evid. 608(a). The Court of Military Review concluded that the testimony was erroneously received, *citing United States v. Cameron,* 21 M.J. 59

(C.M.A. 1985), but harmless given the state of evidence. Unpub. op. at 3, *See also United States v. Snipes,* 18 M.J. 172, 179 (C.M.A. 1984), and 180 (Everett, C.J., concurring in the result); and *United States v. Cox,* 18 M.J. 72, 73-74 (C.M.A. 1984). Without unravelling the merits of the question, we certainly agree with the court below that the probative force of this testimony was so slight, in comparison with the other evidence that, under the circumstances, appellant could not have been prejudiced. Art. 59(a). Accordingly, no further consideration of the issue is necessary.

The next question involves the testimony of Captain Willard W. Mollerstrom, USAF, Chief of Mental Health Services at Misawa Hospital, who testified on behalf of the prosecution. Captain Mollerstrom held a Master's Degree in Public Health and a Ph.D. in Social Work, and he had experience "in the area of child abuse." Mollerstrom examined the victim on three different occasions, including the evening of November 6 when she was brought to the hospital. Mollerstrom testified that, on that evening, the victim "was nonverbal" and "very withdrawn, very dependent, very evasive." Appellant objects to Mollerstrom's conclusion that this response was "quite common" in child-abuse cases. He also objects to the Captain's opinion that "she [the victim] is capable of knowing the difference between telling the truth, telling a lie, difference between right and wrong as relating to herself." No such objections were voiced at trial.

Essentially, appellant's complaint on appeal is that the record contains an inadequate foundation for Captain Mollerstrom's conclusions. *See* Mil.R.Evid. 702. As a matter of law, we cannot say that the witness was not competent to draw these conclusions or that his knowledge could not assist the triers of fact. In any event, inasmuch

as the victim's testimony was thoroughly corroborated by other witnesses, Mollerstrom's testimony could not have materially prejudiced appellant, even if it had been erroneously received. Art. 59(a). Further, appellant's failure to challenge the foundation waived his objection on appeal. Mil.R.Evid. 103(a)(1).

The final issue is whether Dr. Rosete should have read appellant his Article 31(b), UCMJ, 10 U.S.C. § 831(b), rights before questioning him. It is apparent from this record that Dr. Rosete, who was evaluating appellant at the behest of the defense, was not interrogating appellant or requesting a statement from him within the meaning of Article 31(b). *United States v. Jones,* 24 M.J. 367 (C.M.A.1987). Accordingly, no Article 31 warnings were required, and the issue is without merit.

The decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

Chief Judge EVERETT and Judge SULLIVAN concur.

APPENDIX B

UNITED STATES,

Appellee,

v.

HECTOR L. TOLEDO,
SEAMAN RECRUIT, U.S. NAVY,

Appellant.

No. 54,817.
NMCM 85 3868.

U.S. Court of Military Appeals.

May 9, 1988

For Appellant: *Lieutenant Colonel Richard E. Ouellette, USMC.*

For Appellee: No Appearance Filed.

Opinion of the Court

COX, Judge:

On Petition for Reconsideration

On December 14, 1987, we affirmed appellant's convictions for indecent assault and committing indecent acts on a female under the age of 16 years. *United States v. Toledo,* 25 M.J. 270 (C.M.A.1987). Appellant now petitions for reconsideration of that decision. We grant the petition, but adhere to our earlier decision.

The petition is predicated on two particulars. First, appellant points out that we were in error in stating that appellate defense counsel had not argued that Dr. Rosete, the psychologist, fell within the attorney-client relationship. *See* 25 M.J. at 276. In that regard, appellant is technically correct. A review of both appellant's final brief (page 15, paragraph 2) and the audio recording of the appellant arguments in this case confirms our mistake, and we stand corrected.

However, our decision was not based on a failure to raise the issue. Thus, the fact that it was addressed does not alter the result. Had the issue been viable but not raised, we would have raised it ourselves. Indeed the tenor of our opinion was that the attorney-client relationship, Mil.R.Evid. 502(a), Manual for Courts-Martial, United States, 1984, can be broad enough to encompass the assistance of experts such as psychologists. 25 M.J. at 276. Our point was that an accused or counsel may not simply annex government officials into the attorney-client relationship, but must obtain them through proper channels.

We ventured so far as to assert:

> Had the defense requested that the Government provide it a medical officer for assistance in the preparation of its case, and had the Government failed to do so, we would have concluded, under *Ake [v. Oklahoma,* 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985)], that appellant had been deprived of "[m]eaningful access to justice," given the circumstances in which appellant was discovered . . . *Id.* at 77, 105 S.Ct. at 1094.

25 M.J. at 276. In appellant's case, however, we deemed the tactics employed to be insufficient to achieve attorney-client status. *Id.*

In the same vein, appellant takes issue with our comment that "the defense was apparently seeking to avoid tipping its hand at this juncture of trial preparation." 25 M.J. at 275. As support, he cites the fact that trial defense counsel scheduled appellant's visits with Dr. Rosete through the Staff Judge Advocate, Naval Security Group Activity, Misawa, Japan.* Again, this was not of decisional importance. Our statement was made in the context of rejecting appellant's primary contention on appeal, which was that the Rosete examinations were either *in fact* or *functionally equivalent* to government-ordered mental examinations under R.C.M. 302 and 706, Manual, *supra;* hence, appellant's communications enjoyed a limited privilege under the rules. Our remark amounted to passing speculation as to possible defense motive, not a definitive adjudication of counsel's state of mind.

In summary, our decision is founded upon the fact that statements made to a government psychiatrist are not privileged *per se.* 25 M.J. at 275. If an accused demonstrates a need for a psychiatrist to become a member of the defense team in order to assist in the preparation of his defense, he must do so formally. Otherwise, an accused could arbitrarily commandeer a valuable

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* The offenses occurred at Misawa. The Article 32, Uniform Code of Military Justice, 10 U.S.C. § 832, investigation was conducted there, and appellant was in pretrial confinement there. Therefore, defense counsel's enlistment of assistance from the staff judge advocate's office in obtaining transportation was a matter of necessity. The court-martial, however, was conducted some 424 miles to the south, at Yokosuka, Japan, situs of the general court-martial convening authority. *See Official Tables of Distance, Foreign Travel,* Army Regulation 55-61/Navy Supply Office P-2472 / Air Force Manual 177-136 at 385 (September 1, 1985). Trial and defense counsel were stationed at Yokosuka.

government employee without appropriate considerations of availability, priority of missions, or otherwise. There is sufficient legal authority in Article 46, Uniform Code of Military Justice, 10 U.S.C. § 846, and *Ake* to insure that an accused who needs help in preparing a psychiatric defense will get such help.

We adhere to our decision of December 14, 1987.

Chief Judge EVERETT and Judge SULLIVAN concur.

APPENDIX C

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
200 STOVALL STREET
ALEXANDRIA, VA 22332-2400

IN THE U.S. NAVY-MARINE CORPS COURT OF MILITARY REVIEW BEFORE

C.H. MITCHELL J.T. GLADIS C.J. CASSEL

UNITED STATES

v.

HECTOR L. TOLEDO, 031 52 2481
Seaman Recruit (E-1), U.S. Navy

NMCM 85 3868 Decided 26 March 1986

Sentenced adjudged 18 March 1985. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, U.S. Naval Forces, Yokosuka, Japan.

LTCOL RICHARD E. OUELLETTE, USMC, Appellate Defense Counsel
CAPT F. F. KRIDER, USMC, Appellate Government Counsel

PER CURIAM:

Charged with three specifications of rape, three specifications of forcible sodomy, and two specifications of indecent acts upon a female under the age of 16 years, the accused was convicted, contrary to his pleas, by a general court-martial composed of officer and enlisted

members of one specification of rape, five specifications of indecent assault, and one specification of indecent acts upon a female under the age of 16 years. He was sentenced to a dishonorable discharge, confinement at hard labor for 30 years, and total forfeitures. The convening authority approved the sentence, but suspended confinement in excess of 20 years.

Among other things, the accused contends on apeal that the military judge erred in admitting the testimony of a psychologist concerning the accused's statements to him, permitting him to testify as to his opinion as to the accused's veracity, and permitting the victim's mother, teacher, and an expert to testify concerning the five year old victim's credibility. He also contends that the evidence is insufficient to prove rape. Because we are not convinced beyond a reasonable doubt that there was penetration, we shall reduce the findings of the rape specification to commission of an indecent act upon a child under the age of 16 years, and reassess the sentence. We reject the remaining assignments of error, but discuss several briefly.

A.

The accused testified, denying the charges, but, in order to explain the presence of a large semen stain on his underwear, stated that he had had sex with a bar girl after he left the victim's home. In rebuttal, over defense objection, trial counsel was permitted to introduce the testimony of a military clinical psychologist that, during 10 or 12 hours of interviews, he had delved extensively into the accused's sexual history and received his version of the alleged child molesting incident, but that the sex with the bar girl was not mentioned. Defense counsel objected on the grounds that the accused's statements were privileged under Rule for Courts-Martial (R.C.M.) 706 because

defense counsel had asked that the psychologist interview the accused in order to determine whether there were any problems concerning sanity and had requested that his conclusions, reports, notes and tests be kept in strict confidence. The Military Rules of Evidence do not recognize the doctor-patient privilege. M.R.E. 501(d), App. 22, Analysis at A22-31. The privilege bestowed by M.R.E. 302 on statements of an accused at a mental examination ordered under R.C.M. 706 is inapplicable here where defense counsel did not request such an examination nor was a mental examination ordered under R.C.M. 706. Indeed, defense counsel attempted to circumvent that rule's requirements for disclosure of conclusions. The federal cases cited by the accused as additional authority involve court-ordered examinations and, therefore, are inapposite. On appeal the accused also argues that the testimony of the psychologist violated Article 31(b), Uniform Code of Military Justice (UCMJ). Under the circumstances the psychologist had no duty to warn the accused under Article 31. If he had such a duty, defense counsel's failure to object at trial on this ground constituted a waiver. M.R.E. 103, 304(d)(2)(A), 305.

B.

The psychologist was also permitted to testify, over defense objection, as to his personal opinion regarding the accused's character for truthfulness. His testimony that "given the time I spent with him and the information that he provided, and the manner in which it was provided, that he was being less than candid" was not responsive to the question asked him and was of the tenor condemned in *United States v. Cameron*, 21 M.J. 59 (C.M.A. 1985). The witness was saying more than that, in his opinion, the accused was a person of truthful character. Instead, in con-

text, his testimony constituted an assertion that this expert believed that the accused had not told the truth about the incidents with the victim. Such testimony is inadmissible. *Id.* In view of the warning sounded in Cameron, we trust that trial judges will approach the admissibility of expert testimony as to the truthful character of a witness with caution in cases such as these, in order to avert the risk that the testimony may be construed as an expert opinion concerning the truthfulness of the witness on a specific issue.

The Government contends that any error was waived by the failure of defense counsel to object to the question on the ground of insufficient foundation and the answer on the grounds of unresponsiveness or improper impeachment. We do not agree. Under the circumstances the prior defense objection on the basis of M.R.E. 403 was sufficient. Nevertheless, we are convinced beyond a reasonable doubt that the error was harmless. Before the psychologist testified in rebuttal, the Government had presented a strong case. The defense was weak. The psychologist's opinion that the accused was not telling the truth was cumulative of his admissible testimony concerning the accused's sexual history, which supported the conclusion that the accused's explanation for the semen stain was a fabrication. That explanation strained credulity. The psychologist's admissible testimony added little, his inadmissible testimony nothing, to the Government's case.

C.

The victim's mother testified without defense objection that the victim understood the difference between the truth and a lie and that the mother believed that the statements that the victim made were truthful. (R. 201.) The victim's Sunday School teacher testified without

defense objection that the victim was able to distinguish between the truth and a lie. A witness, who testified that he was a child abuse expert, testified without defense objection that the victim, whom he had interviewed on three occasions, was capable of knowing the difference between the truth and telling a lie, the difference between right and wrong as relating to herself, and able to distinguish reality from fantasy. (R. 213-214.)

The Government was entitled to introduce evidence of the victim's character for truthfulness because of the defense attack upon her credibility during cross-examination. M.R.E. 608(a); *United States v. Woods,* 19 M.J. 349 (C.M.A. 1985). Such evidence should have been limited to the victim's general character for truthfulness. *See United States v. Cox,* 18 M.J. 72 (C.M.A. 1984). Evidence that the witnesses believed that the victim's specific allegations against the accused were truthful would not be admissible. Any error, however, was waived by the failure of defense counsel to object at trial. M.R.E. 103(a). Evidence that these witnesses believed the victim was consistent with the defense theory of the case. The defense theory was that the victim's father, who discovered the accused with his daughter in a compromising position, jumped to the wrong conclusions. He told his wife and others. In order to please and gain approval and reward, the victim, albeit reluctantly, told her mother, the teacher, and others, not the truth, but what they erroneously believed had happened and encouraged her to tell them. Defense counsel's decision not to object was a tactic consistent with his theory.

D.

As noted above, because we are not convinced beyond a reasonable doubt that there was penetration, we shall

modify the findings of guilty of rape. Reassessment of the sentence is required. In instructing on multiplicity for sentencing purposes the military judge treated the seven specifications as three offenses. The conduct of which the accused will remain convicted after our modification of the rape findings, is heinous. We are convinced that had the members been instructed of the permissible maximum confinement for the offenses of which he will remain convicted after our modification, they would have adjudged confinement for at least 15 years.

Accordingly, only so much of the finding of guilty of Specification 2 of Charge I as finds that, at the time and place alleged, the accused committed an indecent act upon the body of the victim alleged, a female under 16 years of age, not the wife of the said accused, by placing his penis upon her genital with intent to gratify his sexual desires, is affirmed. The remaining findings of guilty and, upon reassesment, only so much of the sentence as provides for a dishonorable discharge, confinement at hard labor for 15 years, and forfeiture of all pay and allowances, are affirmed.

We have considered the clemency requests and the matters raised in defense counsel's R.C.M. 1105 submission and his reply to the staff judge advocate's recommendation.

C.H. MITCHELL

C. H. MITCHELL, Senior Judge

J.T. GLADIS

J. T. GLADIS, Judge

C. J. CASSEL

C. J. CASSEL, Judge

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